

negotiating renewals of these leased access agreements would be greater for multiple agreements than for a single agreement.

A higher rate for part-time leased access would compensate cable operators for the higher transaction costs of low-volume purchases of time. Other media offer discounts for volume purchases of advertising time or space because of the savings in transaction costs inherent in volume purchases. While these "bulk discounts" are by no means unique to the media industry, the Commission's existing leased access rate structure forces cable operators to treat all purchases the same, regardless of volume <sup>30/</sup> Cable operators should be permitted to charge a premium for low-volume purchases of leased access time, just as their counterparts in the print and broadcast media do.

Second, part-time leased access makes it practically impossible for cable operators to sell all of their "inventory," *i.e.*, all 24 hours of programming available on a particular leased access channel. Cable operators seldom can integrate part-time programmers into a seamless twenty-four hours of programming. Part-time programmers' demands for distinct time slots almost invariably result in some "gaps" in the programming day, time for which the cable operator receives no compensation.

Linking part-time rates to full-time rates also fails to recognize that the markets for full-time and part-time programming are distinct. Full-time lessees resemble and compete

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<sup>30/</sup> The ability of cable operators to charge different rates for different parts of the day should not be confused with the ability to charge different rates for different *volumes* of programming time purchased. For example, although a one-hour block of programming during prime time may cost more than a three-hour block in a less-attractive time slot, cable operators would still be unable to charge a higher rate for a one-hour block of programming than for a three-hour block within the same time slot.

with cable programming networks, and it is therefore reasonable to peg rates for full-time leased access at levels that reflect the marketplace terms and conditions on which cable networks obtain access to cable systems. This, of course, is what the implicit fee approach does.

Part-time leased access more closely parallels the purchase of *advertising* time on broadcast channels and cable programming services. There already is a competitive and functioning market for the sale of time, in part-time blocks, for "infomercials" and other short-form programming on broadcast channels and cable programming services. The prevailing rates in that market are a more appropriate indicator of reasonable rates for part-time leased access than the prorated maximum rates for full-time channel leasing.

If the Commission sets part-time leased access rates below market-based levels, cable operators will be forced unfairly to subsidize infomercials and other short-form programming. And the effect of this subsidization will skew the existing marketplace, shifting infomercial and short-form paid programming away from broadcasters and cable programmers to the artificially low-priced leased access channels. Indeed, there is convincing evidence that this is already occurring under the existing rules.<sup>31/</sup>

If the Commission establishes a formula that reduces the maximum reasonable rates for full-time leased access, a *pro rata* approach for part-time leased access would drive part-time rates even lower, creating an even greater subsidy with even greater disruptive effects

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<sup>31/</sup> For example, the current cost to lease one-half hour of leased access programming on Cox's Myrtle Beach cable system is \$13 on average. Similarly, but on a larger scale, one half hour of leased access time in San Diego costs \$72.50 on average. Local broadcast stations in Myrtle Beach charge \$100 to \$250 per half hour depending on daypart while one half hour broadcast time cost from \$500 to \$2000 in San Diego.

on the marketplace for the sale of infomercials and other short-form programming — even though virtually no one seriously contends that *part-time* leased access rates under the current formula are too high. Indeed, many systems currently have a vibrant market for part-time leased access programming. For example, a variety of programmers currently purchase half-hour or hour time slots on leased access channels on Cox's Santa Barbara, California.<sup>32/</sup> The market for part-time programming indicates that current rates for part-time leased access are not prohibitive. It is more likely that, for the reasons discussed above, they are too *low*.

If the Commission adopts the proposed cost formula for full-time rates, it should adopt an approach that recognizes the additional costs associated with part-time use and the different markets in which full-time and part-time leased access programmers compete. Maximum reasonable part-time rates should be set at prevailing market levels for the sale of comparable time by broadcast stations and cable programming services. Even if a *pro rata* approach is adopted, there should be an additional premium or surcharge based on the additional costs associated with part-time leasing of channels.

#### **IV. OPERATORS SHOULD NOT BE REQUIRED TO MAKE CHANNELS AVAILABLE FOR LESS THAN EIGHT HOURS OF USE.**

Cox agrees with the Commission's tentative conclusion that operators should not be required to bump existing programming or make available dark channels to accommodate leased access programming in less than eight-hour increments.<sup>33/</sup> As the Commission recognizes, accommodating a leased access request by bumping existing programming may

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<sup>32/</sup> Exhibit B to these Comments lists these programmers and describes the services they provide.

<sup>33/</sup> *Further Notice* at ¶¶ 124-25.

cause "substantially greater harm to the subscribers, the operator, and the non-leased access programmer."<sup>34/</sup> To avoid such harm, the Commission should require leased access programmers to use (or pay for) at least eight hours of programming on a channel before existing programming on that channel can be bumped. This eight-hour time span should include prime time, as this time period affects the greatest number of viewers and is the most valuable (in terms of the rate charged programmers) to operators.

The Commission has proposed to adopt the holding in *TV-24 Sarasota, Inc. v. Comcast*<sup>35/</sup> that existing programming does not have to be bumped if "reasonable accommodation in a comparable time slot" exists for leased access programmers.<sup>36/</sup> The *Sarasota* standard is fair and should be adopted. It is not reasonable for leased access programmers to expect to receive the exact time slot requested when such access would require the removal of existing programming. Providing leased access programmers with time slots that are reasonably comparable to those requested fully satisfies the goals of leased access.

Additionally, the Commission should not require operators to bump programming from a channel unless leased access programmers commit to using the channel for at least a one-year period. Operators should not be required to bump existing programming for leased access programmers who will use the channel for only brief periods of time. It is burdensome for the operator to bump programming, and even more burdensome to have to

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<sup>34/</sup> *Id.* at ¶ 124.

<sup>35/</sup> 10 FCC Rcd 3512 (1994) ("*Sarasota*").

<sup>36/</sup> *Further Notice* at ¶ 124, citing *Sarasota*, 10 FCC Rcd at 3518.

reprogram a channel with non-leased access programming once the leased access programmer no longer wishes to use the channel. A one-year minimum commitment from leased access programmers would benefit viewers, cable operators and ultimately even leased access programmers themselves by ensuring stability in the programming available to viewers.

The Commission is also correct in concluding that *dark* channels should not be opened to accommodate a minimal amount of leased access programming.<sup>37/</sup> Operators incur opportunity costs when they lose the ability to carry new programming on a dark channel, similar to the opportunity costs lost when existing programming must be bumped. It is unfair to require an operator to forgo the future value of a new programming channel to carry leased access programming, unless the operator is guaranteed to recover revenue from an 8 -hour period, including prime time, for a one-year period.

**V. THE COMMISSION HAS NO AUTHORITY TO ESTABLISH PREFERENTIAL LEASED ACCESS RATES OR SET-ASIDES FOR NOT-FOR-PROFIT PROGRAMMERS.**

In the *Further Notice*, the Commission expresses its belief that "[i]n adopting the 1984 Cable Act, Congress contemplated that operators would be permitted to offer preferential leased access rates to not-for-profit entities."<sup>38/</sup> As evidence of Congress' intent, the Commission cites the House Report, which states that cable operators are allowed to discriminate among types of programmers in setting rates for leased access.<sup>39/</sup> While that passage suggests that a uniform leased access rate for all programmers might disadvantage

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<sup>37/</sup> *Id.* at ¶ 125.

<sup>38/</sup> *Further Notice* at ¶ 111.

<sup>39/</sup> *Id.*, citing House Report at 51.

not-for-profit programmers, the House Report as a whole makes clear that the Commission may not require cable operators to subsidize leased access for not-for-profit programmers.<sup>40/</sup> In fact, the passage implies that cable operators could effectively force *other leased access programmers* to subsidize not-for-profit programmers by charging them a higher rate for leased access than the rate offered to not-for-profit programmers.

Given a framework in which the maximum rate cable operators can charge leased access programmers is tied to the costs of making that channel available, any preferential rates for not-for-profit programmers necessarily would force operators to provide channel capacity *below cost*.<sup>41/</sup> In adopting the leased access requirements in 1984, Congress declared that leased access should not impose economic hardships upon cable operators.<sup>42/</sup> Yet under the proposed cost/market rate formula, the financial burden of preferential leased access rates for not-for-profit programmers would fall solely on cable operators, a result clearly at odds with the statutory directive that leased access rates not "adversely affect the operation, financial condition, or market development of the cable system."<sup>43/</sup>

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<sup>40/</sup> See House Report at 50.

<sup>41/</sup> In fact, the adoption of preferential leased access rates for not-for-profit programmers concurrently with the Commission's proposed adoption of its cost/market rate formula would produce precisely the result Congress sought to prevent: the subsidization of leased access programming by cable operators. The cost/market rate formula proposed by the Commission would limit cable operators to recovering their costs in leasing channels.

<sup>42/</sup> "The diversity envisioned by this scheme is to be brought about in a manner which is not inconsistent with the growth and development of cable systems." House Report at 48. "[T]he Committee is very sensitive to the notion that this scheme of mandated leased access not undermine the economic viability of a cable system." *Id.* at 50.

<sup>43/</sup> 47 U.S.C. § 532(c)(1).

Congress authorized the Commission to set maximum leased access rates so cable operators would not set artificially high rates to discourage competition from unaffiliated programmers. Consequently, the Commission's role is limited to setting a maximum rate that allows the market for leased access to operate freely, without anticompetitive pricing by cable operators. Congress did not authorize the Commission to maximize the use of leased access by not-for-profit programmers. Once the Commission establishes a fair maximum rate for leased access, its role is complete — whether not-for-profit programmers choose to pay that rate or not. There is abundant evidence in the record that leased access is a risky venture for any programmer. As Congress noted in 1992, "[t]he cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use."<sup>44/</sup> Nothing in the 1992 Cable Act<sup>45/</sup> authorizes the Commission to guarantee not-for-profit programmers access to an outlet they would not otherwise seek to use in a competitive market. Given the Commission's mandates — to set fair maximum rates for leased access without harming the financial well-being of cable operators — it may well be impractical for

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<sup>44/</sup> S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991).

<sup>45/</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act").

not-for-profit programmers to pay leased access rates.<sup>46/</sup> Neither the 1984 Cable Act<sup>47/</sup> nor the 1992 Cable Act empowers the Commission to alter that market-based result.

The Commission should not interfere with market demand for not-for-profit programming by setting aside a certain amount of leased access channel capacity for not-for-profit programming. Provided that the Commission does not adopt preferential rates for not-for-profit programmers, cable operators would have no incentive to exclude not-for-profit programmers from leased access channels and set-asides would be unnecessary.

Furthermore, PEG channels already offer not-for-profit programmers an outlet for reaching cable subscribers, so there is no need to reserve for them a portion of commercial leased access channel capacity. In its initial rate order, the Commission expressed its belief that "adequate provision has been made for not-for-profit programmers under Section 611 of the Communications Act."<sup>48/</sup> Indeed, public access likely represents a more attractive option than leased access for not-for-profit programmers because public access represents a *free* outlet for their programming.

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<sup>46/</sup> Although not-for-profit programmers rarely use leased access, Cox has found that existing leased access rates — particularly for part-time leased access — are not beyond the means of not-for-profit programmers. For instance, Cox's Pensacola and Myrtle Beach systems each have leased access programmers that are church groups. The scarcity of not-for-profit programming on commercial leased access channels is more likely attributable to the availability of public, educational and governmental ("PEG") channels as free outlets for not-for-profit programming.

<sup>47/</sup> Cable Communication Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (the "1984 Cable Act").

<sup>48/</sup> *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5954 (1993).



**VI. LEASED ACCESS PROGRAMMERS SHOULD NOT BE ABLE TO RESELL CHANNEL SPACE.**

The Commission requests comment on whether leased access users should be allowed to resell leased access time to other programmers.<sup>49/</sup> Allowing this type of resale is contrary to Congress' intent and is unfair to cable operators

The existing and proposed leased access rules set the maximum rate that operators may charge leased access programmers for channel access. If resale of this channel space is allowed, the channel lessees could sublease the space to other programmers at a higher fee, eliminating the intended benefits to leased access programmers of the maximum rate requirements. Moreover, while the leased access rules limit cable operators' ability to determine what programming to include on their tiers, resellers would have no such restrictions on considering program content. They would thus be much better able than cable operators to maximize the commercial value of leased access channels.

Reselling channel space is not consistent with any of the leased access policy goals. The Commission states that it does not want to create a subsidy for leased access programmers.<sup>50/</sup> Allowing resale would not be subsidizing the *programmers*, as they will have to pay the unregulated rates charged by the leased access channel holders. Resale will instead be subsidizing *resellers* by allowing them to charge higher prices for channel space on cable systems. It is unfair for operators, who build and invest in their cable systems, to be required to subsidize leased access programmers' business of renting channel space to

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<sup>49/</sup> *Further Notice* at ¶ 141.

<sup>50/</sup> *Id.* at ¶ 27.

others. Congress intended no such subsidy, and it did not intend to create a new business of "cable channel space retail." If the Commission decides to allow leased access resale, it should require resale rates to be below or no higher than the maximum rate imposed on cable operators.

### **CONCLUSION**

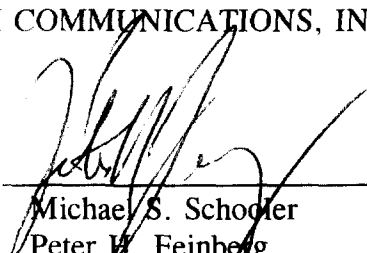
The Commission's current implicit fee formula, with minor changes, is a far better methodology to compute reasonable leased access rates than the proposed cost-based formula. Any perceived double recovery that the current formula may generate is *de minimis*. The current formula does not result in "double recovery" by operators and generates rates that generally enable operators to recover the reasonable costs of leasing channel capacity to

programmers. For the foregoing reasons, the proposals set forth in these Comments will establish a leased access ratesetting methodology that comports with Congress' intent to establish reasonable rates while ensuring that operators are not financially harmed.

Respectfully submitted,

COX COMMUNICATIONS, INC.

By:



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May 15, 1996

## **EXHIBIT A**

### **Leased Access Programmers on Cox's Myrtle Beach, SC System**

#### **Full-Channel Programmers:**

- 1). Video Broadcast Productions (residential and commercial)  
Tourist related video product
- 2). BEACH TV of South Carolina (residential and commercial)  
Tourist related video product
- 3). On the Green Golf Magazine (commercial only)  
Primarily golf products and some summer tourist related video.

#### **Part-time Programmers on Leased Access Channel 47**

- 1). Karoake Sounds (local)  
Karoake musical shows
- 2). Wofford College (Spartanburg, SC)  
Football coach's show
- 3). WAGS TV (local)  
Golf related shows  
Talk show/forum type programming
- 4). McCloud Productions "Video Vacations" (local)  
Comedy/sitcom style
- 5). Coastal Carolina University (local)  
Christian Music Video show
- 6). Cherry Grove Productions (local)  
Basketball Coach's show
- 7). The Roberts Agency (Tampa)  
Health Craft Cookware show
- 8). Saving Grace Ministries (local)  
Religious Show

## **EXHIBIT B**

### **Part-Time Leased Access Programmers on Cox's Santa Barbara, CA System**

#### **LOCALS ONLY**

Local bands are showcased in a music video format

#### **ALL ROUND THE TOWN**

A half-hour program, containing long-form commercials from 10 or 15 local advertisers. A host is added to give the program flavor.

#### **BEST OF SANTA BARBARA**

This is exactly like All Around the Town, but produced by a different group

#### **ASA**

Market research firm, researching advertising and new programs

#### **HIDDEN CRIMES**

A hour-long show exposing animal experimentation and abuse in medical research

#### **AUTO VISION**

A local producer buys the time and advertises used cars in a CACS environment

#### **INFORMERCIALS**

- Metal Detecting
- Dick Clark (music products)
- National Cover (makeup)
- Dream Weaver (sleep aid program)

### **CERTIFICATE OF SERVICE**

I, Cynthia M. Forrester, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that a copy of the foregoing "Comments of Cox Communications, Inc." was sent via hand delivery, this 15th day of May, 1996, to the following:

The Honorable Reed E. Hundt  
Chairman  
Federal Communications Commission  
1919 M Street, NW, Room 814  
Washington, DC 20554  
(STOP CODE 0101)

The Honorable Rachelle B. Chong  
Commissioner  
Federal Communications Commission  
1919 M Street, NW, Room 844  
Washington, DC 20554  
(STOP CODE 0105)

The Honorable James H. Quello  
Commissioner  
Federal Communications Commission  
1919 M Street, NW, Room 802  
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Meredith J. Jones, Esq.  
Chief, Cable Services Bureau  
Federal Communications Commission  
2033 M Street, NW, Room 918A  
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The Honorable Susan Ness  
Commissioner  
Federal Communications Commission  
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Cynthia M. Forrester